June 20, 1990

MEMORANDUM

TO: The Honorable John Waihee
Governor of Hawaii

FROM: Hugh R. Jones
Staff Attorney

SUBJECT: Public Inspection of Financial and Compliance Audit of Kahua Ho'omalu Kina, Inc., dba Protection and Advocacy Agency of Hawaii

This is in reply to a memorandum dated April 18, 1990, from Charleen M. Aina, Deputy Attorney General. Ms. Aina's memorandum requests an advisory opinion, on your behalf, concerning whether the above-referenced financial and compliance audit is subject to public inspection and copying under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes, ("UIPA"). The Office of Information Practices ("OIP") also received a similar request for an advisory opinion, dated April 24, 1990, from Patty M. Henderson, Executive Director, Protection and Advocacy Agency of Hawaii.

ISSUE PRESENTED

Whether, under the UIPA, a financial and compliance audit of the Protection and Advocacy Agency of Hawaii, prepared by an independent accounting firm at the request of the Office of the Governor, is subject to public inspection and copying.

BRIEF ANSWER

We conclude that the "Executive Summary," section V, and the "Finding" and "Recommendation" portions of sections III and IV of the DH&S audit are subject to the UIPA's exception for

government records which, if disclosed, may frustrate a legitimate government function. Among other things, this UIPA exception protects from required agency disclosure, certain inter-agency and intra-agency memoranda which are covered by the "deliberative process privilege." This privilege applies to government records which are "deliberative" and "predecisional" in character. Importantly, however, this UIPA exception is discretionary. That is to say, this exception may be waived by an agency if it determines that the disclosure of such material will not frustrate a legitimate government function.

Additionally, the UIPA's "frustration" exception does not require an agency to disclose "confidential commercial and financial information." However, relying upon case law interpreting Exemption 4 of the federal Freedom of Information Act, 5 U.S.C. . 552 (Supp. 1989), and previous Office of Information Practices advisory opinions, we conclude that the commercial information set forth in the DH&S audit is not "confidential." Specifically, in our opinion, the disclosure of this information will not result in substantial competitive harm to the P&A. Further, the disclosure of this information will not impede the Office of the Governor's ability to obtain similar information from the P&A in the future, because it has the contractual right to inspect and conduct audits of the P&A's records.

Moreover, while the DH&S audit contains information in which individuals may have a significant privacy interest, in our opinion, the disclosure of this information will not result in a "clearly unwarranted invasion of personal privacy," under section 92F-13(1), Hawaii Revised Statutes. We believe that under the UIPA's balancing test, the public interest in disclosure of this information outweighs an individual's significant privacy interest in the information. The P&A performs significant public purposes using sizeable public subsidies to do so. The disclosure of the DH&S audit will open the P&A's operation, management, and expenditure of public funds to the the sharp eye of public scrutiny.

FACTS

Three federal statutes, the Developmental Disabilities Assistance and Bill of Rights Act of 1973, 42 U.S.C. . 6001 (Supp. 1990), the Rehabilitation Act of 1973, 29 U.S.C. . 701 (Supp. 1990), and the Protection and Advocacy for Mentally Ill

Individuals Act of 1986, 42 U.S.C. . 10801 (Supp. 1990), all as amended, provide substantial federal aid to the states for the protection of and advocacy for, developmentally disabled, handicapped, and mentally ill individuals, and to provide information, referral, and assistance programs to handicapped individuals. These federal statutes require that in order for the states to receive their respective federal allotments, a protection and advocacy system must be in effect in each state. Further, each such system must be independent of any agency which provides treatment or services to persons who are developmentally disabled, mentally ill, or handicapped. Additionally, each state's protection and advocacy system must, among other things, have authority to pursue legal, administrative, and other appropriate remedies to insure the protection of, and advocacy for, the rights of the developmentally disabled, the mentally ill, and the handicapped.
Each state's protection and advocacy system must also, with certain qualifications, have the authority to access the records of the developmentally disabled, the mentally ill, and the handicapped.

Pursuant to Executive Order, the Governor of the State of Hawaii designated Kahua Ho'omalu Kina, Inc., also known as the Protection and Advocacy Agency of Hawaii ("P&A"), as the State's protection and advocacy system under the above federal laws. Under an agreement between the Office of the Governor and the P&A for the fiscal year 1989 (hereinafter "Governor's Agreement"), the State paid the P&A $293,250.00, and retained the right to conduct audits of the P&A's operations to monitor (1) its compliance with the Governor's Agreement, and (2) its expenditure of public funds. To this end, the Office of the Governor, through the State Comptroller, requested the firm of Deloitte Haskins & Sells ("DH&S") to perform a compliance and financial audit of the P&A for the year ending September 30, 1989.

According to DH&S, the scope of its audit included the following:

1. An audit of the financial statements of the P&A for the year ending September 30, 1989.

2. A study and evaluation of the P&A's system of internal accounting controls to determine their adequacy in assuring the proper management of funds received and compliance with the applicable laws and regulations.

3.An examination of the administration of the State's protection and advocacy system by the P&A for compliance with the terms of contract number 25165 dated September 8, 1988, between the Office of the Governor, State of Hawaii, and the P&A for the period October 1, 1988 to September 30, 1989, and the applicable laws and regulations.

DH&S's stated objectives in performing the audit were to:

1.Render an opinion on the financial statements of the P&A for the year ending September 30, 1989.

2.Determine whether the P&A has established sufficient internal controls to properly manage the funds received and to comply with the applicable laws and regulations.

3.Determine whether the P&A has complied with the terms of the contract with the Office of the Governor, State of Hawaii, to administer the State's protection and advocacy system.

The Office of the Governor has received requests to inspect DH&S' audit of the P&A, and through the Department of the Attorney General, requested an advisory opinion from the OIP regarding whether, under the UIPA, the DH&S audit of the P&A is subject to public inspection and copying.

DISCUSSION

The UIPA, the State's new open records law, provides that "[a]ll government records are open to public inspection unless access is restricted or closed by law." Haw. Rev. Stat. § 92F-11(a) (Supp. 1989). Under the UIPA, a government record "means information maintained by an agency in written, auditory, visual, electronic, or other physical form." Haw. Rev. Stat. § 92F-3 (Supp. 1989). There being no genuine issue that the financial and compliance audit performed by DH&S is information maintained by an agency in some physical form, we turn to a consideration of the applicability of the UIPA exceptions to public access, set forth at section 92F-13, Hawaii Revised Statutes.

A. FRUSTRATION OF LEGITIMATE GOVERNMENT FUNCTION

Section 92F-13(3), Hawaii Revised Statutes, provides that a government agency is not required to disclose "[g]overnment records that, by their nature, must remain confidential in order for the government to avoid the frustration of a legitimate government function."

1. Inter-agency and Intra-agency Memoranda

In previous OIP advisory opinions, we opined that under the "frustration" exception, an agency need not disclose certain inter-agency and intra-agency memoranda which are subject to the common law "deliberative process privilege." See, e.g., OIP Op. Ltr. Nos. 90-8 (Feb. 12, 1990); 90-11 (Feb. 26, 1990). As explained in these OIP advisory opinions, there are two fundamental requirements, both of which must be satisfied, in order for the deliberative process privilege to be invoked. First, the communication must be predecisional, i.e., "antecedent to the adoption of an agency policy." Jordan v. Department of Justice, 591 F.2d 753, 774 (D.C. Cir. 1978). Secondly, the communication must be deliberative, i.e., "a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

In determining whether a document is predecisional, an agency does not necessarily have to point specifically to an agency final decision, but merely establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process." Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980). On this point the United States Supreme Court has been very clear:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151, 95 S. Ct. 1504, 1516, 44 L. Ed. 2d 29 (1975) (emphasis in original).

There are several important limitations on the scope of the deliberative process privilege. First, the deliberative process privilege does not apply to "purely factual material appearing in [government records] in a form that is severable without compromising the private remainder of the documents." EPA v. Mink, 410 U.S. 73, 91, 93 S. Ct. 827, 838, 35 L. Ed. 2d 119, 134 (1973). However, factual segments of otherwise deliberative documents may be protected from disclosure if the manner of selecting or presenting the facts would reveal the deliberative process, or if the facts are "inextricably intertwined" with the policy-making process. See Montrose Chemical Corp. v. Train, 491 F.2d 63, 68 (D.C. Cir 1974); Soucie v. David, 448 F.2d 1067, 1078 (D.C. Cir. 1971).

Secondly, this privilege applies to inter-agency or intra-agency memoranda, a phase that would seem to contemplate only those communications generated by an "agency." This issue is significant, because the P&A audit was generated by an independent accounting firm, which is not an "agency" as defined by section 92F-3, Hawaii Revised Statutes. However, in recognition of the practicalities of agency operations, federal courts have construed the scope of the deliberative process privilege expansively, and have included communications generated from outside of an agency within the scope of this privilege. This pragmatic approach has been characterized as the "functional test" for assessing the applicability of the deliberative process privilege under Exemption 5 of the Freedom of Information Act, 5 U.S.C. . 552 (1989) ("FOIA"). See Durns v. Bureau of Prisons, 804 F.2d 701, 704 n.5 (D.C. Cir.) (employing "a functional rather than a literal test in assessing whether memoranda are `inter-agency or intra-agency'"), reh'g en banc denied, 806 F.2d 1122 (D.C. Cir. 1986), cert. granted, judgment vacated on other grounds & remanded, 108 S. Ct. 2010 (1988).

Under this "functional" approach, agency documents generated by outside consultants have been found eligible for the protection of the deliberative process privilege of FOIA's Exemption 5, on the basis that agencies, in the exercise of their government functions, commonly have "a special need for the opinions and recommendations of temporary consultants." Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1972).

Thus, in Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980), the court concluded that questionnaires regarding the selection of judges for federal court vacancies, that were sent by the United States Attorney General to all United States Senators, were eligible for protection under FOIA's Exemption 5. Noting that agencies frequently require the opinions of temporary consultants and that such guidance is "an integral part of the deliberative process," the court held:

> When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely reasonable to deem the resulting document to be an "intra-agency" memorandum for purposes of determining the applicability of Exemption 5.

Ryan, 617 F.2d at 790. In accord, CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1270 (1988).

However, a minority of courts have not embraced the "functional test" and have rigidly applied the "inter-agency or intra-agency" threshold requirement, such that agency records generated by non-agency personnel have been found not protected by the deliberative process privilege. See, e.g., Thurner Heat Treating Corp. v. NLRB, 839 F.2d 1256, 1259-60 (7th Cir. 1988). Thus, in Van Bourg, Allen, Weinberg & Roger v. N.L.R.B., 751 F.2d 982 (9th Cir. 1985), the Ninth Circuit Court of Appeals held that affidavits submitted by private parties to the NLRB as part of an investigation into unfair labor practices, were not protected from disclosure under FOIA's Exemption 5. In Van Bourg, the Ninth Circuit, citing the Ryan decision, held:

> [E]xemption 5, by its terms applies only to internal agency documents or documents prepared by outsiders who have a formal relationship with the agency.

Van Bourg, 751 F.2d at 985 (emphasis added).

Although a careful reading of the decision in Van Bourg shows that the decision is not necessarily inconsistent with the "functional test" employed in Ryan, we nevertheless think the better view is that expressed by the court in CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1161 (D.C. Cir. 1987):

> Whether the author is a regular agency employee or a temporary consultant is irrelevant; the pertinent element is the role, if any, that the document plays in the process of agency deliberations. If information communicated is deliberative in character it is privileged from disclosure, notwithstanding its creation by an outsider. [Emphasis added.]

Accordingly, we conclude that government records are eligible for protection under the UIPA's exception for records which, if disclosed, would frustrate a legitimate government function, notwithstanding their creation outside of the agency, provided that such government records have been solicited by the agency and are "deliberative" and "predecisional" in character. Importantly, however, not all documents and memoranda generated by non-agency personnel are "deliberative" and "predecisional" in character. Indeed, many government records prepared by non-agency personnel are outside the scope of this privilege. Thus, we now turn to an examination of the DH&S audit to determine whether it contains information protected by the "deliberative process privilege."

The DH&S audit contains an "Executive Summary" and five sections, entitled "Introduction," "Financial Statements," "Report on Internal Controls," "Compliance Audit," and "Timetable for Implementing Recommendations," respectively. The Executive Summary summarizes the DH&S' findings and recommendations with respect to each of the five sections of the audit.

Section I, "Introduction," sets forth general information concerning the P&A, its goals and functions, and the scope and objective of the audit. Section II, "Financial Statements," contains a description of the P&A's assets and liabilities, a statement of its revenue and expenses, as well as a detailed itemization of the P&A's expenditures for the year ending September 30, 1989. Section III "Report on Internal Controls," contains a review of the P&A's accounting practices and procedures, and is divided into headings labeled "Observation," Finding," and "Recommendation." Section IV, "Compliance Audit," concerns the P&A's compliance or non-compliance with the Governor's Agreement, and federal laws and regulations. Additionally, section IV contains evaluations of certain P&A personnel, its Board of Directors, the P&A's budgeting, and community opinion. Like section III, section IV is divided into subsections entitled "Observation," "Finding,"

and "Recommendation." Lastly, section V of the audit contains a proposed timetable for the implementation of all the recommendations made by DH&S in the audit.

In our opinion, sections I and II of the DH&S audit contain purely factual information that is not eligible for protection from disclosure under the deliberative process privilege. With respect to the "Finding" and "Recommendation" portions of sections III and IV of the DH&S audit, in our opinion, this material is subject to the deliberative process privilege and may be withheld from disclosure by the Office of the Governor. Based upon our review of this material, it is both "deliberative" and "predecisional." First, these portions of the DH&S audit set forth the opinions, advice, or recommendations of the auditor concerning the operation of the P & A. "Recommendations on how best to deal with a particular issue are themselves the essence of the deliberative process." National Wildlife Fed'n. v. United States Forest Serv., 861 F.2d 1114, 1121 (9th Cir. 1988). Secondly, in our opinion, these portions of the audit are "predecisional" in character insofar as they clearly may be used by the Office of the Governor in the continuing process of deciding whether to continue, amend, or terminate its designation of the P&A as Hawaii's official protection and advocacy system under 45 C.F.R. . 1386.20 (1989). Additionally, documents that flow from agency subordinates to a superior official, such as the Governor in this case, are more likely to be found predecisional than those which flow in the opposite direction. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d at 868.

In short, the advisory opinions and recommendations expressed in the "Finding" and "Recommendation" portions of sections III and IV of the DH&S audit contain advice to the Office of the Governor that is part of the Governor's continuing process of examining its policies toward the P&A. We reach the same conclusion concerning the audit's "Executive Summary" and section V of the audit.

On the contrary, in our opinion, the "Observation" portions of sections III and IV contain primarily purely factual information which does not reveal the deliberative process or which is not "inextricably intertwined" with the policy-making process. "[A] report does not become part of the deliberative process merely because it contains those facts which the person making the report thinks material. If this were so, every

factual report would be protected as part of the deliberative process." Playboy Enterprises, Inc. v. Dep't. of Justice, 677 F.2d 931, 935 (D.C. Cir. 1982). Accordingly, we conclude that the "Observation" portions of the audit are not subject to the deliberative process privilege under section 92F-13(3), Hawaii Revised Statutes.

Importantly, the UIPA exception for government records which, if disclosed, would frustrate a legitimate government function, is discretionary. That is to say, under the UIPA, a government agency desiring to disclose government records subject to protection under section 92F-13(3), Hawaii Revised Statutes, may permissibly waive the protection and disclose the materials. Based upon our review of the DH&S audit, we believe that there is a significant public interest in the disclosure of the auditor's findings concerning the performance and operation of the P&A. However, as pointed out in OIP Opinion Letter No. 90-11 (February 26, 1990), the exception set forth at section 92F-13(3), Hawaii Revised Statutes, does not depend upon a balancing of the public interest in disclosure against the governmental interest in confidentiality. In short, the Office of the Governor may, but is not required to, disclose government records which are protected by the "frustration of government function" exception to public access, including government records subject to the deliberative process privilege.

2. Confidential Commercial and Financial Information

Sections II, III, and IV of the DH&S audit contain some detailed commercial and financial information relating to the P&A. Also protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, is "confidential commercial and financial information." See S. Stand. Comm. Rep. No. 2580, 14th Leg., Reg. Sess., Haw. S.J. 1093, 1095 (1988). Previous OIP advisory opinions have discussed the scope of this exception as applied to "confidential commercial and financial information."[1] These opinions, relying upon decisions of the federal courts interpreting Exemption 4 of FOIA, stated that:

[1] See OIP Op. Ltr. Nos. 89-5 (Nov. 20, 1989); 89-13 (Dec. 12, 1989); 90-3 (Jan. 18, 1990).

> [C]ommercial or financial matter is "confidential" for purposes of this exemption if disclosure is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.

OIP Op. Ltr. No. 89-5 (Nov. 20, 1989); OIP Op. Ltr. No. 90-3 at 9 (Jan. 18, 1990), quoting, National Parks and Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974) "National Parks I"). For reasons set forth below, we conclude that the disclosure of the commercial and financial information relating to the P&A in the DH&S audit does not satisfy either prong of the National Parks I test quoted above.

First, under the first prong of the National Parks I test, courts have held that the disclosure of commercial and financial information will not impair the government's ability to obtain necessary information in the future, where the information has not been submitted voluntarily. Id. at 770, see also, CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1152 n. 143 (D.C. Cir. 1987) (impairment not established where submission of the information is mandatory); cert. denied, 108 S. Ct. 1270 (1988). Section D of the P&A's Agreement with the Office of the Governor provides:

> 3.[The P&A] shall maintain accounting procedures and practices acceptable to the [Governor] and shall maintain books, records, documents and other evidence which sufficiently and properly reflect all direct and indirect expenditures of any nature related to [the P&A's] performance of this Agreement. The books, records, and documents shall be subject at all reasonable times to inspection, reviews, or audits by the [Governor], State Department of Budget and Finance, the State Department of Accounting and General Services, State legislators and Legislative Auditor, or by their duly authorized representatives.
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> 4.[The P&A] shall retain and permit [the State] to inspect and have access to, any documents, papers, books, records and other evidence which are pertinent to this Agreement and which are

> necessary to enable said agencies or persons to conduct surveys, audits, and examinations of [the P&A's] performance of this Agreement. [Emphasis added.]

In OIP Opinion Letter No. 90-3 (January 18, 1990), we concluded that the disclosure of State audits of airport concessionaires would not impair the government's ability to obtain necessary information in the future, where pursuant to contract, the State was empowered to inspect the concessionaire's records. The contract provisions therein were substantially identical to those in the Governor's Agreement quoted above.

Secondly, while federal courts interpreting Exemption 4 of FOIA have held that information may qualify as "commercial" in character even if the provider is a nonprofit corporation,[2] to prove substantial competitive harm under the National Parks I test, "the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." Sharyland Water Supply Corp. v. Block, 755 F.2d 397, 399 (5th Cir. 1985) (emphasis added); see also OIP Op. Ltr. No. 89-5 at 17 (Nov. 20, 1989).

In Sharyland, a nonprofit water supply corporation sought to enjoin the Farmers Home Administration from disclosing, under the FOIA, audit reports which the company filed with the FHA as part of a loan application. The nonprofit corporation asserted that the disclosure of the audits and financial statements would harm its relations with contractors, materialman, suppliers, employees, and landowners. In Sharyland, the court found that the district court's determination that the nonprofit corporation faced insignificant competition with other water suppliers, was not clearly erroneous. Hence, the court in Sharyland upheld the trial court's ruling that the audit reports were not "confidential" commercial or financial information under Exemption 4 of FOIA.

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[2] See Critical Mass Energy Project v. NRC, 830 F.2d 278 (D.C. Cir. 1987).

To our knowledge, the P&A does not face actual competition in the provision of advocacy and information services to the handicapped, the developmentally disabled, and the mentally ill. While it is true that other organizations render advocacy services to the handicapped, the developmentally disabled, and the mentally ill, the P&A does not actually "compete" with such organizations in the true or commercial sense of the word. On the contrary, one of the P&A's main objectives is to foster a system that provides "cooperation, communication, information, and education among the community, the judiciary, and federal, state, local and private social service providers" and to establish "coordination and linkages with public and private service providing agencies." Further, the P&A enjoys a special status, since it, and it alone, is the protection and advocacy system designated by the State for the receipt of federal funds.

Further, while to some, the disclosure of portions of the DH&S audit might prove embarrassing to the P&A, courts have held that harms flowing from "embarrassing" disclosures are not cognizable under Exemption 4 of FOIA. General Electric Co. v. NRC, 750 F.2d 1394, 1402-03 (7th Cir. 1984); see also CNA v. Financial Corp. v. Donovan, 830 F.2d 1132, 1154 (D.C. Cir. 1987) ("unfavorable publicity" insufficient for showing competitive harm); Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1291 n. 30 (D.C. Cir. 1983) (competitive harm limited to that flowing from "affirmative use of proprietary information by competitors").

Thus, we conclude that although much of the information in the DH&S audit is "commercial and financial information" pertaining to the P&A, that information is not "confidential." Accordingly, this commercial and financial information is not protected from disclosure by the UIPA's exception in section 92F-13(3), Hawaii Revised Statutes, for government records which, if disclosed, would frustrate a legitimate government function. Even assuming that such information qualified as "confidential commercial and financial information," as discussed earlier, the Office of the Governor may nevertheless disclose this information, if in its judgment, disclosure would not frustrate a legitimate government function. We now turn to the consideration of the UIPA's privacy exception as applied to the information contained in the DH&S audit.

B. CLEARLY UNWARRANTED INVASION OF PERSONAL PRIVACY

The DH&S audit contains references to financial information regarding certain P&A employees. Among other things, the audit discloses the exact salaries of the Deputy Director of the P&A and of an advocate, and the average salaries for other professional P&A employees. Similarly, the audit describes employee benefits and "perks" extended to certain P&A employees, and describes certain payments made to P&A's Executive Director. Further, the audit evaluates the working relationship between the P&A's Executive Director and its Board of Directors, evaluates the Board's productivity, and expresses opinions on other personnel matters relating to the P&A, including the nongovernmental employment and educational histories or qualifications of certain P&A employees.

Thus, we must consider whether any of this information contained in the DH&S audit may be protected under the UIPA's exception for "[g]overnment records which, if disclosed, would constitute a clearly unwarranted invasion of personal privacy." Haw. Rev. Stat. § 92F-13(1), Hawaii Revised Statutes.

First, the UIPA's privacy exception when applicable, only protects information concerning "individuals." Under the UIPA, only "natural persons" have cognizable privacy interests. See Haw. Rev. Stat. §§ 92F-3 and 92F-14(a) (Supp. 1989). Thus, information concerning a corporation, no matter how sensitive, is not protected from disclosure under section 92F-13(1), Hawaii Revised Statutes.

Secondly, under the UIPA, an individual's privacy interest in information contained within a government record must be "significant," before the UIPA's privacy exception may initially be applied. See S. Conf. Comm. Rep. No. 235, 14th Leg., Reg. Sess., Haw. S.J. 689, 690 (1988); H. Conf. Comm. Rep. No. 112-88, 14th Leg., Reg. Sess., Haw. H.J. 817, 818 (1988) ("[o]nce a significant is found, the privacy interest will be balanced against the public interest in disclosure").

In section 92F-14(b), Hawaii Revised Statutes, the Legislature set forth examples of information in which an individual has a "significant" privacy interest. Section 92F-14(b), Hawaii Revised Statutes, states in pertinent part:

> (b) The following are examples of information in which the individual has a significant privacy interest:

. . . .

(4) Information in an agency's personnel file, or applications, nominations, recommendations, or proposals for public employment or appointment to a governmental position, ...

(5) Information relating to an individual's nongovernmental employment history except as necessary to demonstrate compliance with requirements for a particular government position;

(6) Information describing an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or credit worthiness;

. . . .

(8) Information comprising a personal recommendation or evaluation.

Haw. Rev. Stat. § 92F-14(b)(4), (5), (6) and (8) (Supp. 1989).

As mentioned above, the DH&S audit contains information relating to amounts paid to certain officers or employees of the P&A, personnel related evaluations, employee benefits, and the nongovernmental, educational, or employment history of certain P&A employees. For purposes of our analysis, we shall assume that "individual" employees of the P&A possess a significant privacy interest in this data under section 92F-14(b)(4), (5), (6), and (8), Hawaii Revised Statutes. However, the existence of a significant privacy interest in a government record does not, in itself, shield such information from disclosure. Rather, section 92F-14(a), Hawaii Revised Statutes, declares that "[d]isclosure of a government record shall not constitute a clearly unwarranted invasion of personal privacy if the public interest in disclosure outweighs the privacy interest of the individual." Thus, under the UIPA, an individual's privacy interest in a government record must be balanced against the public interest in disclosure, to determine whether a given disclosure would be "clearly unwarranted."

Like the UIPA, the Uniform Information Practices Code ("Model Code"), which the Legislature used as a model for

theUIPA, also incorporates the "clearly unwarranted invasion of personal privacy" standard. The commentary[3] to the Model Code explains the need for a balancing test as part of an open records law:

> Despite its imprecision, the "clearly unwarranted invasion of personal privacy" standard is preferable to a statutory scheme that enumerates individual privacy interests as confidential without regard to context or to the public interest in disclosure. Privacy and access issues are rarely susceptible to such categorical treatment.

In OIP Opinion Letter No. 89-16 (Dec. 27, 1989), we discussed the "public interest" to be considered in applying the UIPA's balancing test set forth at section 92F-14(a), Hawaii Revised Statutes. In that opinion, we noted that like the FOIA, the UIPA's central purposes are to make available information which sheds light upon "what the government is up to," and "to ensure that that the Government's activities be opened to the sharp eye of public scrutiny," quoting, Federal Labor Relations Authority v. U.S. Department of the Treasury, 884 F.2d 1446, 1451 (D.C. Cir. 1989). Indeed, the UIPA declares that "opening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." Haw. Rev. Stat. . 92F-2 (Supp. 1989).

While the P&A may not be an "agency" of the State of Hawaii for purposes of the UIPA, pursuant to the Governor's Agreement, in 1989, the P&A was paid $293,250.00 representing funds contributed by the taxpayers of the State of Hawaii. According to the DH&S audit, this sum represents approximately 40% of all revenues received by the P&A for the year 1989. Another 57% of the P&A's revenue was in the form of grants from the federal government. These public funds were paid presumably to ensure that information, advocacy and assistance programs were effectively and efficiently delivered to developmentally

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3 The UIPA's legislative history directs those interpreting its provisions to consult the Model Code's commentary, where appropriate, to guide the interpretation of similar UIPA provisions. See H. Stand. Comm. Rep. No. 2580, 14th Leg., Reg. Sess., Haw. H.J. 969, 972 (1988).

disabled, handicapped, or mentally ill residents of the State of Hawaii. To the extent that over 97% of the P&A's revenue is in the form of State and federal grants, there is a significant public interest in the disclosure of information which reflects how efficiently and effectively, and for what purposes, the taxpayer's funds are being managed and spent. Indeed, 42 U.S.C. § 6042(a)(2)(C) (1989) requires as a condition of the receipt of federal grant money, that each state's protection and advocacy system "on an annual basis, provide the public with an opportunity to comment on priorities established by, and activities of, the system."

Moreover, under the UIPA, there is a significant public interest in the disclosure of information concerning the expenditure of public funds. See Haw. Rev. Stat. § 92F-12(a)(3), (8), (9), (10), and (14) (Supp. 1989). Likewise, chapter 23, Hawaii Revised Statutes, which establishes the Office of the Legislative Auditor, is further evidence of the substantial public interest in the disclosure of information concerning the expenditure of public funds. Indeed, had the P&A audit been performed by the Office of the Auditor, as is expressly permitted by the Governor's Agreement, its report would be subject to public inspection as required by section 23-9, Hawaii Revised Statutes.

Similarly, the DH&S audit also discusses the extent to which the P&A has complied with its Agreement, and with federal rules on the receipt of grant money. There is, in our opinion, a significant public interest in information concerning the P&A's compliance, or non-compliance, with its contract with the State and with federal grant restrictions. Despite its independent status, the P&A serves important public purposes using significant public subsidies. Notwithstanding the significant privacy interests implicated by portions of the DH&S audit, in our opinion there is an overriding public interest in disclosure of the audit under section 92F-14(a), Hawaii Revised Statutes, insofar as disclosure will open the P&A's operation, management, and expenditure of public funds to the sharp eye of public scrutiny.

CONCLUSION

We conclude that portions of the DH&S audit are subject to the UIPA's exception for government records which, if disclosed, may frustrate a legitimate government function, because portions of the audit contains information subject to the "deliberative

process privilege." However, this UIPA exception is discretionary and may be waived by an agency if it determines that disclosure of a government record, or portions thereof, will not frustrate a government function. Additionally, we conclude that although the DH&S audit contains "commercial and financial information," such information is not "confidential" under the UIPA's "frustration" exception for "confidential commercial and financial information." Lastly, for the reasons stated in this opinion, we conclude that the disclosure of the DH&S audit would not "constitute a clearly unwarranted invasion of personal privacy" under section 92F-13(1), Hawaii Revised Statutes. Accordingly, the Office of the Governor may, under the UIPA, disclose the DH&S audit in its entirety, if it desires to do so.

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